

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Review of the Commission's Regulations)
Governing Television Broadcasting)

MM Docket No. 91-221

Television Satellite Stations)
Review of Policy and Rules)

MM Docket No. 87-7

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REPLY COMMENTS OF JACOR COMMUNICATIONS, INC.

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SUMMARY

The comments filed in this proceeding demonstrate conclusively that the one-to-a-market rule has outlived its usefulness and should be eliminated or, at a minimum, substantially relaxed. Over the past 25 years, the number of radio and TV stations has increased substantially. Just as significantly, there has been explosive growth in non-broadcast media, such as cable television, print media and on-line services. This expansion in the number of media outlets has resulted in a level of media diversity that could not have been imagined when the rule first was adopted.

Only one party, Black Citizens for a Fair Media, *et al.* ("BCFM") contends that the rule should be retained in its present form, and the waiver process made more stringent, because changing the rule would reduce the diversity of media viewpoints in general, and the amount of local news and other local programming in particular. As Jacor demonstrates in these reply comments, eliminating the one-to-a-market rule will not have the negative impact on diversity feared by BCFM. Because of the competition broadcasters face -- from each other and from non-broadcast media -- there is a significant marketplace incentive to respond to consumer needs, including the need for programs of local interest. Increased common ownership of radio and TV stations will permit group owners to provide within a market a greater variety of programming formats and viewpoints than is now possible.

Furthermore, there is no reason to believe that common ownership of a TV station and the maximum permitted number of radio stations would give a group owner undue control over the ability of particular individuals or groups to speak. An attempt by a station owner to impose a news "black out" of this nature would be bad business because it is not what consumers want or expect from the media. Moreover, given the plethora of competing broadcast and non-broadcast media, exclusion from one group of stations would not prevent a person or group from being able to speak.

Congress required that the Commission take account of the increased competition faced by broadcasters in this proceeding. Congress recognized that broadcasters could not compete effectively with other media, such as cable television, if they could not take advantage of the efficiencies of common ownership. Given the policies underlying the 1996 Act, the burdens of the existing rule (both on the Commission and the industry) and the substantial public benefits of common ownership, there is no reason for the Commission to "wait and see" before eliminating, or at least relaxing, the rule in this proceeding.

If the Commission -- despite all the evidence to the contrary -- retains the one-to-a-market rule, it should substantially relax its application of the rule. There is ample support in the record for Jacor's proposal that the Commission grant waivers in any market in which there are 15 independent voices. In counting voices, the Commission must include all the media which compete with TV and radio stations, including cable television, print and other non-broadcast media. Any

other approach to counting voices would significantly understate the level of media diversity in a market.

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REPLY COMMENTS OF JACOR COMMUNICATIONS, INC.

Jacor Communications, Inc. ("Jacor"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding. The comments filed by Jacor and others demonstrate conclusively that the one-to-a-market rule is antiquated and should be eliminated. At a minimum, the Commission must substantially relax the rule in recognition of the marketplace changes that have taken place since the rule first was adopted and the deregulatory policies underlying the Telecommunications Act of 1996 (the "1996 Act").

I. INTRODUCTION

The comments filed in this proceeding are virtually unanimous in their support for the elimination of the one-to-a-market rule or, at a minimum, substantial relaxation of the rule. ^{1/} As Jacor and others demonstrated, there has

^{1/} See, e.g., National Association of Broadcasters Comments at 13; ABC Comments at 8-9; CBS Comments at 5-6; Paxson Communications Comments at 19.

been a substantial increase in the number of television and radio stations, as well as an explosion in non-broadcast media such as cable television and the Internet. These changes are significant for two reasons. First, the increased number of media outlets means there is greater ease with which a speaker can obtain access to a mass market, and therefore a greater diversity of viewpoints in the market. Second, TV and radio stations face a substantially increased level of competition, with a corresponding increase in the incentive to operate efficiently and provide programming that meets consumers' needs.

Only one party to this proceeding supports retaining the one-to-a-market rule in its current form. Black Citizens for a Fair Media, *et al.* ("BCFM") support retaining the rule, and tightening the waiver policy, because changes in the rule "would diminish the number of independent media voices, thereby reducing the diversity of viewpoints available to the public at the local level." 2/ As shown below, the BCFM comments utterly fail to take into account marketplace realities and the deregulatory policies underlying the 1996 Act. While the one-to-a-market rule may have been appropriate in a time when diversity was limited and consumers were largely dependent on broadcast media for news and entertainment, broadcasters now compete in a multimedia world where people are far more likely to complain of "information overload" than too few voices. In conjunction with the deregulatory policies underlying the Telecommunications Act of 1996, these market

2/ BCFM Comments at 1.

developments have rendered the one-to-a-market rule unnecessary to preserve diversity and an obstacle to the efficient operation of TV and radio stations.

Accordingly, based on the marketplace and statutory changes documented in the record, the Commission should eliminate the one-to-a-market rule. At a minimum, the Commission should relax the rule to permit radio/TV combinations with the maximum number of radio stations permitted by Congress in any market in which there will be 15 independent voices.

II. ELIMINATION OR RELAXATION OF THE ONE-TO-A-MARKET RULE WILL NOT JEOPARDIZE THE COMMISSION'S DIVERSITY GOALS.

The central thesis of the BCFM comments is that any changes in the one-to-a-market rule will have negative consequences on the level of media diversity -- both diversity of ownership and diversity of program formats, particularly news and public affairs programming -- and therefore the rule should be retained in its current form. As explained below, this position is not supported by the record and ignores the policy goals established by Congress.

A. Market Forces Will Produce Media Diversity Without FCC Intervention.

The primary deficiency in the BCFM comments is their failure to recognize the marketplace incentives that exist to satisfy consumer demand for diverse, locally-oriented programming. Television and radio stations are supported by advertising revenues, which are a function of the number of viewers or listeners. Therefore, every television station owner and every radio station owner has an

incentive not only to provide a service that meets the needs of consumers, but to distinguish its service from that provided by other stations.

Given these marketplace incentives, any concern that demand for local news and other local programming will be left unsatisfied is unfounded. For example, in recent years there has been a substantial increase in local news coverage on television. Without any FCC intervention, cable operators (sometimes in partnership with local broadcasters) have responded to consumer demand for local news by programming 24-hour local news channels. Similarly, there is no shortage of local news coverage on television stations, with many stations offering early morning, lunchtime, early evening and late night news shows. The notion that there is insufficient coverage of local news is simply untenable.

In light of this demonstrated ability of broadcast and non-broadcast media to respond to consumer demand, the real concern expressed by BCFM may be that stations will not provide niche programming, *i.e.*, programming for which there is only limited demand. This concern also is not warranted, because elimination of the one-to-a-market rule would increase, rather than decrease, the ability of a group owner to respond to consumer demand for niche programming. As explained in Jacor's comments, a multi-station owner can devote time and resources to formats that a stand-alone station could not afford to support. 3/

Furthermore, just as there is an incentive to offer diverse programming formats, the market also provides an incentive to offer diverse

3/ Jacor Comments at 6-7.

viewpoints. In a recent speech, Commissioner Ness hypothesized that there could not be diversity in a market in which a group owner with 8 radio stations refuses to accept advertising or provide news coverage of a candidate for mayor or governor. 4/ As an initial matter, it is inconceivable that there would be a news "black out" by an entire group of stations because there are business consequences to not providing time for newsworthy people or events. Incidents of this type of outright bias against certain individuals or groups do not happen because it is not what the viewing public expects or wants. As CBS explains in its comments, "the more diverse these stations are, both in programming formats and in viewpoints, the more successful the group of stations can become." 5/

Even if an otherwise newsworthy speaker is excluded from the stations owned by one company for personal or political reasons, that speaker could find an outlet on another television or radio station. Indeed, a candidate's exclusion from one group of stations very likely could become a newsworthy issue for other media outlets. Even if no station is willing to provide time to a candidate -- presumably because he is not newsworthy -- non-broadcast media, such as public access channels on a cable system, newspapers or the Internet, also are available. In sum, there are more vehicles by which a candidate can receive exposure than ever before

4/ Remarks of Commissioner Susan Ness before the Michigan Association of Broadcasters at 3 (February 25, 1997) ("Ness Speech").

5/ CBS at 22 (emphasis added).

and more competitive reasons for a group broadcaster to provide diverse viewpoints.

The critical point here is that decisions regarding the type of programming that best meets the needs of the public should be made by the market, not by the Commission. 6/ A policy that limits the ability of a single company to own TV and radio stations in the same market due to fears that demand for certain types of programming will not be satisfied, or that certain speakers will be excluded, is not supported by the record and, as discussed below, is not consistent with the market-based policies established by Congress.

B. Diversity Is Not The Commission's Only Goal.

BCFM's comments rest on the principle that more independent voices always are better than less. 7/ A policy that promotes only diversity, however, is not in the public interest because it ignores the competitive market in which broadcasters operate and the public benefits that may result from joint operation of TV and radio stations. The Commission repeatedly has recognized in the waiver

6/ "For CBS, and for any other group owner, the powerful economic incentives to diversify the programming and viewpoints presented on stations in the same market -- incentives which are far more effective than any governmental mandate -- make regulation directed at the protection of diversity entirely superfluous." CBS at 24.

7/ "Commenters would prefer that the Commission not set any minimum number of voices, but instead adopt policies to maximize the number of voices." BCFM Comments at 5.

process that there are substantial public benefits flowing from joint ownership. 8/

As Commissioner Ness stated in that same speech:

Radio duopolies have enabled group owners to diversify into programming that otherwise might not have been carried but for the combined channel capacity and economies of scale. 9/

In the 1996 Act, Congress reached a similar conclusion regarding the benefits of common ownership and required the Commission to strike a new balance between diversity and efficiency concerns. Congress specifically mandated that the Commission extend its existing waiver policy from the top 25 markets to the top 50, and the legislative history of the Act expressly requires the Commission to take into account the "increased competition" that exists in the media marketplace in considering the degree to which additional relaxation of the one-to-a-market rule is appropriate. 10/

The increased competition faced by TV and radio stations -- with each other and with non-broadcast media -- places a premium on efficient operation and distinctive programming. Congress recognized that broadcasters could not compete effectively with other media, such as cable television, if they could not take

8/ See, e.g., *Shareholders of Citicasters Inc. and Jacor Communications, Inc.*, Memorandum Opinion and Order, File Nos. BTC, BTCH, BTCCT-960222IA through 960222IV, FCC 96-380 (released September 17, 1996) at ¶ 18 (recognizing that cost savings from common ownership would enable Jacor to provide improved news and weather coverage and additional public interest programming).

9/ Ness Speech at 3.

10/ H.R. Rep. No. 104-458 at 163 ("Conference Report").

advantage of the efficiencies and other public benefits that result from common ownership. To the extent that some broadcasters are still hindered in their ability to achieve these objectives when this proceeding concludes, the Commission will have failed to reflect this competition in its rules as Congress intended.

III. THERE IS NO NEED TO “WAIT AND SEE” HOW THE CHANGES BROUGHT ON BY THE 1996 ACT WILL IMPACT DIVERSITY BEFORE ELIMINATING OR RELAXING THE ONE-TO-A-MARKET RULE.

BCFM also asserts that the Commission should determine the impact of the 1996 Act on diversity before making further changes in the broadcast ownership rules. 11/ This approach is overly cautious and not in the public interest.

As an initial matter, Congress fully expected that the Commission would eliminate or relax the rule in this proceeding. Congress knew the Commission was considering changes in the one-to-a-market rule and placed no restrictions on the Commission’s ability to eliminate or modify the rule now. Indeed, the legislative history requires the Commission to take into account the increased competition facing broadcasters in reaching a decision. 12/ Consequently, where the record so strongly supports elimination of the rule, any undue delay in taking action would prevent the public from realizing the benefits of increased common ownership.

11/ BCFM Comments at 4.

12/ Conference Report at 163.

The Commission must take account of the fact that continued enforcement of the rule places a substantial burden on broadcasters. To compete in the multimedia world, "broadcasters must be permitted to achieve ownership efficiencies essential to effective competition, and to have access to capital on competitive terms in efficient transactions with predictable regulatory outcomes." ^{13/} The one-to-a-market rule, however, has precisely the opposite effect. Not only does the rule limit efficiencies derived from common ownership, it adds uncertainty and delay to transactions.

Moreover, the fear that eliminating or relaxing the one-to-a-market rule now will be the difference between diversity and no diversity ignores the realities of the market. The economic analysis provided by CBS demonstrates that elimination of the rule would not result in a significant concentration of broadcast ownership in any of the Top 50 DMAs. ^{14/} Because there would be no undue concentration from a competitive perspective, there should be no concerns from a diversity standpoint either. In addition, the presence of non-broadcast media further ensure that there will be diversity even if the maximum permitted level of consolidation takes place. Accordingly, rather than continue to burden the broadcast industry with a cumbersome and unpredictable waiver process, the Commission should eliminate, or at least streamline, the one-to-a-market rule now.

^{13/} CBS Comments at 4.

^{14/} CBS Comments, Appendix at 7 ("a complete repeal of the cross-ownership rule to permit maximal joint ownership of TV stations and radio stations in the top 50 DMAs is unlikely to bring HHIs to levels that cause significant competitive concerns").

IV. ANY RULE RETAINED BY THE COMMISSION MUST BE RELAXED SIGNIFICANTLY.

If the Commission determines that the one-to-a-market rule still serves a useful purpose -- despite all the evidence to the contrary -- there is broad support in the record for changing the required number of voices and/or the way voices are counted. ^{15/} As described in Jacor's comments, there has been an explosion of non-broadcast media that is completely unaccounted for in the current "30 voices" test. As just one example of these changes, cable television now offers dozens, in some cases hundreds, of channels -- including PEG channels focused primarily on matters of local concern -- to well over 90 percent of the country. The Commission cannot ignore these fundamental changes in the media marketplace by retaining the 30 voices standard.

The 15 voices test proposed by Jacor more accurately reflects the level of media diversity, and is more than adequate to preserve this diversity. As explained above, all radio and TV stations have an incentive to satisfy consumer demand. Thus, as long as there is competition in the market there will be diversity,

^{15/} Some parties advocate a standard based on less than 30 voices if the one-to-a-market rule is not eliminated, *see, e.g.*, CBS Comments at 27 (20 voices); Paxson Comments at 22 (20 voices), and virtually all parties support expanding the definition of voices to include print media (daily and weekly newspapers and magazines), cable television and other multichannel video providers. *See* ABC Comments at 11; Sinclair Comments at 13; Shockley Comments at 7.

and a market with 15 independent voices is by all measures a competitive market. 16/

While there is near universal agreement that the waiver process should be streamlined, BCFM suggests that the Commission increase the burden on waiver applicants, and the Commission staff, by requiring specific programming commitments and reporting requirements. 17/ This proposal completely ignores the deregulatory intent of the 1996 Act and should be rejected. It is not appropriate or necessary for the Commission to extract promises to provide specific types of programming as a condition of gaining FCC approval for a transaction. Rather, the marketplace will provide broadcasters with ample incentive to share the benefits of consolidation by providing programming that is more diverse and more responsive to local needs. Robust competition will produce far greater benefits to the public than the Commission ever could hope to generate through additional regulation.

V. CONCLUSION

The media world has changed forever, and it is time for the Commission's rules to keep pace. The record in this proceeding demonstrates that the one-to-a-market rule no longer is necessary to promote diversity and is an obstacle to the ability of broadcasters to compete in the multimedia marketplace.

16/ In the unlikely event that a transaction in a market with 15 independent voices raises competition concerns, the Department of Justice has authority, and a demonstrated ability, to intervene as necessary.

17/ BCFM Comments at 9.

Consequently, the rule should be eliminated. At a minimum, the Commission should substantially relax the rule to permit radio/TV combinations with the maximum number of radio stations permitted by Congress in any market with 15 independent voices.

Respectfully submitted,

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